CASE NO. 16-2297

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

THE COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

NATIONAL LABOR RELATIONS BOARD

CASE NO.: 20-CA-139745; 363 NLRB NO. 195

PETITIONER'S OPPOSITION TO MOTION TO DISMISS

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I. INTRODUCTION

The National Labor Relations Board ("Board") has moved to dismiss the petition for review filed by the Committee to Preserve the Religious Right to Organize ("Petitioner") on the grounds that Petitioner does not have standing and has failed to establish that it properly filed its petition in this judicial circuit. As an initial matter, this Court may not decide the Motion to Dismiss until the matter is submitted to the Judicial Panel on Multidistrict Litigation, which is tasked with the responsibility of designating which court of appeals will hear the case.

Furthermore, the Board's arguments regarding standing and venue are misplaced. The Petitioner has clearly been aggrieved by the Board's order because it did not get all the relief it requested. As an aggrieved charging party, the Petitioner has a statutory right to seek review in this Court. The Petitioner thus has standing in its own right. The Petitioner also has associational standing to represent its members, who suffered personal injury. Filing the petition in this circuit was proper because an unfair labor practice was committed in this circuit. Because the Petitioner has standing and this is a proper venue, the Motion to Dismiss should be denied.

II. ARGUMENT

1. <u>The Seventh Circuit may not decide the Motion to Dismiss until the matter is submitted to the Judicial Panel on Multidistrict Litigation.</u>

There are two pending petitions for review of the Board's Order: the petition before this Court, and a petition filed by Hobby Lobby in the Fifth Circuit.

Because there are multiple petitions for review, this matter must be submitted to the Judicial Panel on Multidistrict Litigation under the provisions of 28 U.S.C. § 2112(a)(3) before this Court takes any action.

28 U.S.C. § 2112(a)(3) provides:

> If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals.

This statutory provision is mandatory. It requires the Board to notify the Judicial Panel on Multidistrict Litigation when two Petitions are filed. Instead of following this procedure for determining which court of appeals will hear the case, the Board has sought to have this Court decide its Motion to Dismiss before the Judicial Panel is notified and has a chance to designate a court of appeals.

The Board has it in the wrong sequence. The statute is mandatory and the Board must make the filing with the Judicial Panel on Multidistrict Litigation and allow the panel to decide through the process provided by the statute the

appropriate circuit. After that has been determined, the circuit to which the cases are assigned may decide the motion to dismiss or any other motion.

This issue was considered by the Second Circuit in *Superior Industries International v. NLRB*, 865 F.2d 1 (2nd Cir. 1988). That Court held that the procedure for designation of a court of appeals in § 2112[1] governs, and that even if a petition was challenged as to its validity, the court to which the cases are assigned based upon § 2112 should decide that issue. *Id*. at 2 (noting that "§ 2112 is intended to be a mechanical rule for determining which court should determine venue in the case of conflicting petitions for review"); *see also International Union, United Automobile Workers v. NLRB*, 677 F.3d 276, 277 (6th Cir. 2012) (interpreting Section 2112(a)(3) to be mandatory if a timely petition is filed).

This also appears to have been the rule applicable before the statute was amended to provide the current process to determine which circuit a case may be heard where there are two filings. *Cf. Kronenberg v. NLRB*, 496 F.2nd 18 (1974).

It is clear that the statutory language is mandatory and the National Labor Relations Board must submit this matter to the Judicial Panel which then will determine which circuit is the consolidated circuit. The consolidated circuit can then make the determination whether the Petitioner in the Seventh Circuit lacks standing. This is the appropriate sequence given the mandatory language.

[1] Prior to the current scheme set out in 28 U.S.C. § 2112(a)(3), the sequence of filing determined which court of appeals would hear the case.

2. The Petitioner is aggrieved because it did not get all the relief requested.

Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f), provides that "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order" in a court of appeals. "[S]tanding to appeal an administrative order as a 'person aggrieved,' 29 U.S.C. § 160(f), arises if there is an adverse effect in fact and does not . . . require an injury cognizable at law or equity." *Retail Clerks Union 1059 v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965).

"As long as a charging party . . . gets less than he requested," he is treated as a person aggrieved under section 10(f). *Chatham Manufacturing Co. v. NLRB*, 404 F.2d 1116, 1118 (4th Cir. 1968). In *Oil, Chemical and Atomic Workers v. NLRB*, 694 F.2d 1289, 1294-96 (D.C. Cir. 1982), the union prevailed in the proceeding before the Board, but because "it was not granted the relief requested" it was deemed to have standing as an aggrieved party. *See also Truck Drivers and Helpers Local No. 728 v. NLRB*, 386 F.2d 643, 644 (D.C. Cir. 1967) (union did not receive the entire remedy requested).

Similarly, the Petitioner here "prevailed" in part but was not granted all the relief it requested. Specifically, the Petitioner requested that:

- The employer should be required to toll the statute of limitations for any claims for the period during which the forced unilateral arbitration policy has been in place until a reasonable time after employees received the notice

so that employees may assert any collective or group claims that they have and the employer does not reap the advantage of forestalling and foreclosing group claims.

- The employer should not be allowed to implement a new forced unilateral arbitration policy until after it has completely remedied this case by rescinding all the unlawful policies, posting an appropriate notice allowing employees to take appropriate legal action without the implementation of any purported forced arbitration waiver.
- The employer should be required to post permanently the Board's employee rights notice.
- The standard Board notice should be supplemented to contain an affirmative statement of unlawful conduct and an admission of wrongdoing because employees would not otherwise understand the arcane language of the notice.
- Any notice that is posted should be posted for same length of time as the period from when the violation began until the notice was posted because the short period of 60 days is inadequate.
- The notice should be mailed to all employees to ensure adequate notice to employees.
- The Decision of the Board should also be mailed to all current and former employees to ensure adequate notice of what occurred.

- The employees should be allowed work time to read the Board's Decision and notice.
- The notice should be read to employees by a Board agent outside the presence of management, and employees should be allowed to inquire as to the scope of the remedy and the effect of the remedy so that an appropriate explanation is provided.

The Board denied all of these requested remedies. *See Hobby Lobby Stores, Inc.*, 363 NLRB No. 195, n.4 (May 18, 2016) (denying any remedies beyond those provided in *D.R. Horton* and *Murphy Oil*). The denial of each of the above remedies constitutes aggrievement.

Because the charging party got "less than [it] requested," *Chatham Manufacturing Co.*, 404 F.2d at 1118, it is an aggrieved party and may seek review of the Board's Order in this Court.

3. <u>The Petitioner has Article III standing to represent its members and standing in its own right as an aggrieved charging party.</u>

The Petitioner has associational standing to represent its members. The Petitioner is a committee made up of unions and other persons, including current and former employees who were injured by the forced unilateral arbitration policy they were required to sign as a condition of employment at Hobby Lobby. Such an association has Article III standing to represent its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim

asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

Here, at least one member of the Committee to Preserve the Religious Right to Organize would have standing to sue in her own right because she was personally injured by the forced unilateral arbitration policy maintained by Hobby Lobby and is personally injured by the Board's denial of the requested relief in this case. The denial of the requested relief is an injury in fact that can be traced to the Board's Order, and would be redressed by a favorable decision by this Court. Protecting these interests is germane to the purpose of the Committee, which seeks to protect the rights of workers to engage in concerted activity for mutual aid or protection. Finally, neither the claim asserted nor the relief requested would require participation by individual members of the Committee. Thus, the Petitioner has standing to represent the interests of its members before this Court.

The Petitioner also has standing in its own right as an aggrieved charging party, given the statutory right to file charges with the Board and petition for review in a court of appeals if it is denied the relief sought. It is well-established that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). Here, the Petitioner had the legal right to bring a charge against

Hobby Lobby to protect the Committee's interest in workers' ability to join together to advance the collective cause of labor. Hobby Lobby's maintenance of a forced unilateral arbitration policy that required workers to give up their right to engage in concerted activity—and the Board's order failing to adequately protect this right—injured the Committee's interest in workers' ability to join together to advance the collective cause of labor, protecting workers' basic dignity, preventing labor unrest, and stabilizing the economy. This is a distinct and palpable injury to the Petitioner. "[E]ven if it is an injury shared by a large class of other possible litigants" and would normally not satisfy prudential standing requirements, the fact that Congress bestowed the right to file a charge with the Board and seek review of the Board's order in a court of appeals upon any aggrieved person confers standing on the Petitioner: "persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also Sierra Club v. Morton*, 405 US 727, 732 n.3 (1972) ("[W]here a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' is one within the power of Congress to determine."). Because Congress gave the Petitioner the right to file a charge with the Board and seek review in a court of appeals if it was denied relief in whole or in part, the Petitioner has Article III standing to seek review of the Board's order.

4. The Petition for Review was properly filed in this Circuit.

The Board claims that the Petitioner has failed to establish that it properly filed its Petition for Review in this Circuit. However, as alleged in the Petition, an unfair labor practice occurred in this Circuit because Hobby Lobby maintains retail stores, distribution centers and other workplaces throughout the entire country and maintained an unlawful forced unilateral arbitration policy that applied to all employees. It maintains many stores and facilities in this Circuit. http://www.hobbylobby.com/store-finder. The Petition was thus properly filed in this Circuit under section 10(f) of the NLRA, 29 U.S.C. § 160(f), which provides that review may be sought in any circuit "wherein the unfair labor practice in question was alleged to have been engaged in." Here at least the Notice is being posted nationwide supporting our argument that this is properly in this Circuit.

III. CONCLUSION

For all the foregoing reasons, the Motion to Dismiss should be denied.

Date: July 1, 2016

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ DAVID A. ROSENFELD
By: DAVID A. ROSENFELD
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Petitioner's Opposition to Motion to Dismiss with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on July 1, 2016.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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I certify that the above is true and correct. Executed at Alameda, California, on July 1, 2016.

/s/ Karen Kempler
Karen Kempler